

JAMES S. MITCHELL
WILLIAM DAWSON

IBLA 87-191

Decided September 27, 1988

Appeals from a decision of the Colorado State Office, Bureau of Land Management, denying protests of dependent resurvey Group No. 736.

Dismissed.

1. Appeals: Generally -- Patents to Public Lands: Generally -- Rules of Practice: Appeals: Dismissal -- Survey of Public Lands: Dependent Resurvey

Generally, the Board will dismiss an appeal challenging the results of a dependent resurvey if the lands on both sides of the disputed boundary have been patented to private owners prior to the time the protest is lodged.

2. Appeals: Generally -- Patents to Public Lands: Generally -- Rules of Practice: Appeals: Dismissal -- Survey of Public Lands: Dependent Resurvey

A resurvey conducted by the Cadastral Survey is improperly undertaken to the extent it establishes boundaries between private tracts of land if the survey of those boundaries is not necessary to establish a boundary between private and Federal lands. Once patent has been issued, the rights of the patentees are fixed and the Government has no power to interfere with such rights by resurveying the boundaries.

APPEARANCES: James S. Mitchell, Lake City, Colorado, pro se; William Dawson, Grand Junction, Colorado, pro se; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

James S. Mitchell and William Dawson have appealed from a November 14, 1986, decision of the Colorado State Office, Bureau of Land Management (BLM), denying their protests challenging a dependent resurvey of a portion of secs. 33 and 34, T. 44 N., R. 4 W., New Mexico Principal Meridian, Hinsdale, Colorado. The resurvey was identified as Group No. 736.

The basis for appellants' challenge is BLM's placement of corner No. 2 of the Wade's Placer mining claim (M.S. No. 66). The Wade's Placer mining claim was originally surveyed between December 3 and December 10, 1875, by Deputy U.S. Mineral Surveyor W. C. Lewman. The original plat and field notes for M.S. No. 66 were accepted on March 1, 1876, and Patent No. 2180 was issued to Samuel Wade et al. on March 17, 1877.

Following patent, a major portion of M.S. No. 66 was subdivided as Wade's Addition to the town of Lake City (Wade's Addition). On June 6, 1877, the streets and alleys in Wade's Addition were dedicated to the town of Lake City. Wade's Addition was replatted by Robert F. Harrison in 1966, and the Harrison plat was accepted by the Trustees of the town of Lake City on December 3, 1966.

A dependent resurvey was conducted by BLM pursuant to Special Instructions dated March 29, 1983, and various supplemental special instructions. The purpose of the resurvey was to re-establish various boundaries, including the northerly, easterly, and southerly boundaries of M.S. No. 66, to facilitate a proposed exchange involving contiguous Federal lands commonly referred to as the "Hall exchange." Initial field work was undertaken between May and October 1983. A plat of the dependent resurvey was sent to the Chief, Branch of Cadastral Survey, on November 1, 1983, and accepted on November 18, 1983. The notice of acceptance of this plat was subsequently published in the Federal Register (48 FR 55053 (Dec. 8, 1983)).

On February 9, 1984, Patent No. 05-84-0013 was issued to William C. and Ruthanne M. Hall (the Halls). The tract patented to the Halls was described by lots established during the course of the survey accepted on November 18, 1983. The Federal lands contiguous to the northerly, easterly, and southerly boundaries of M.S. No. 66 were conveyed to the Halls by this patent.

On February 21, 1985, Russell E. Cavanaugh, Land Surveyor, BLM, addressed a memorandum to the Chief, Southwest Unit, outlining the results of a field investigation. On March 12, 1985, BLM issued a memorandum suspending the survey plat accepted on November 18, 1983. The stated basis for suspension was the Cavanaugh memorandum, which determined that line 1-2, M.S. No. 66 was not established in its proper position during the dependent resurvey executed under Group No. 736.

On March 4, 1985, supplemental special instructions were issued directing a corrective dependent resurvey of line 1-2 of M.S. No. 66. After receiving protests filed by Mitchell and others, on October 7, 1986, the Chief, Southwest Unit, Cadastral Survey, ordered an investigation of the placement of corner No. 2 and the field conditions with respect to the lines 1-2 and 2-3. Mitchell had asserted that, because of an error in the location of corner No. 2, a strip of land along line 2-3 of M.S. No. 66 approximately 27 to 33 feet in width had been excluded from M.S. No. 66 in the resurvey. Almost the entire length of this strip was covered by a road known as East Street.

BLM then resurveyed the 1-2 line and investigated the evidence pertaining to the location of corner No. 2 and corner No. 3 of M.S. No. 66, as resurveyed in 1983. Line 1-2 was changed slightly to intersect corner No. 1 of the Lake City survey. However, no changes were made in the placement of either corner No. 2 or corner No. 3 as remonumented in the 1983 survey. Following this examination, plats and field notes for the corrective resurvey, Group No. 736, were finalized. These plats and field notes were accepted on September 26, 1986, and a notice of filing was printed in the Federal Register (51 FR 37086 (Oct. 17, 1986)). Appellants filed protests of the survey results.

[1-2] On November 14, 1986, the Director, Colorado State Office, BLM, issued a decision dismissing the protests. The portion of that decision pertinent to this opinion stated:

The BLM has no authority or desire to change boundaries between private lands where the Federal Government has no interest, and where the location of boundaries is controlled by state law. The Act of March 3, 1909 (35 Stat. 845), as amended June 25, 1910 (30 Stat. 884; 43 U.S.C. § 772) reads in part as follows:

" . . . that no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement."

Federal case law states:

"Vested rights in lands once surveyed, platted and disposed of by [the] Federal Government could not be affected by a subsequent resurvey and plat covering the same lands. Missouri Pac. R. Co. v. Sales, 1939, 127 S.W. 2d 133, 197 Ark. 1111."

Also:

"A government resurvey cannot disturb title, which parties have acquired up to the time that it was made. Bentley v. Jenne, Wyo. 1925, 236 P. 509, 33 Wyo. 1.

An Interior Board of Land Appeals decision states:

"Prior to passing title from the United States, the government has the right to establish or reestablish boundaries on its own land. However, once patent has been issued, the rights of the patentee are fixed and the government has no power to interfere with such rights by a corrective survey. Therefore, the results of a dependent resurvey conducted by the Cadastral Survey will not alter or [a]ffect any boundaries between private tracts of lands. In disputes between private owners, the location of corners reestablished by a

dependent resurvey conducted subsequent to a patent does not make the new survey conclusive against the prior purchaser so as to prevent his assertion of the title he has acquired as against the one claiming under the new survey." Alice L. Alleson, Frances Alleson, 77 IBLA 106 (1983).

The Federal Government has disposed of its interests in the land affected by the situation being protested. Therefore I must dismiss this protest because the BLM no longer has the authority to influence title to this land.

(Nov. 14, 1986, Decision at 2-3).

Generally, the above statements of the law are correct. Thus, as we have noted, when "all lands have been patented to private owners, disputes concerning boundaries between private owners are matters for the jurisdiction of the state court where the lands are located." Sarah and Magie Calvin, 94 IBLA 162 (1986); see also Titus O. Nashookpuk, Sr., 99 IBLA 213 (1987). Moreover, except for certain specified exceptions, the authority of the Department to conduct public land surveys extends only to lands owned by the United States. Sarah and Magie Calvin, *supra* at 166. Upon the issuance of the exchange patent to the Halls on February 9, 1984, there was no longer any land in section 34 which remained unpatented. From that point on, the Department lacked authority to process a corrective survey for any part of the lands in question. It, thus, necessarily follows that the corrective resurvey approved for line 1-2 in 1986 is a legal nullity since it was executed after all Federal title had passed with respect to the lands in question.

This, of course, does not end the matter. Corners Nos. 1 and 2 of M.S. No. 66 were established in the 1983 dependent resurvey. As we noted above, the 1983 resurvey was, itself, suspended on March 12, 1985. Practically speaking, however, this suspension may be irrelevant as the exchange patent issued while the 1983 resurvey was still in effect and the limits of land patented are determined by reference to the survey in effect at the time of patent. Sarah and Magie Calvin, *supra*; Benton C. Cavin, 83 IBLA 107, 131 (1984).

This does not necessarily mean that the land shown by the 1983 resurvey to be contiguous to the easterly boundary line of M.S. No. 66 was granted to the Halls. If, in point of fact, appellants were able to show that the lines established by the 1983 resurvey encroached upon the land patented under M.S. No. 66, no title to such lands could pass under the exchange patent. The United States would have none to pass. However, the jurisdiction to make this determination does not lie within the Department. Just as BLM no longer had the authority to conduct a corrective resurvey of this land after the issuance of the Hall's patent, so, too, does this Board now lack jurisdiction to adjudicate any question as to the proper location of the disputed corners. As counsel for BLM has noted: "[T]he appropriate forum for establishing private boundaries is a State or Federal court applying State law" (Answer at 1).

We also recognize that, even if appellants were unable to establish that the 1983 resurvey improperly located corners No. 2 and 3, with the result being that East Street was never within the limits of M.S. No. 66, that street appears to be a dedicated road under the provisions of R.S. 2477, section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), repealed by § 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793. However, the Department has taken the consistent position that, as a general proposition, state courts are the proper forum for determining whether, pursuant to this statutory provision, a road is properly deemed to be a "public highway." See, e.g., Leo Titus, Sr., 89 IBLA 323, 337-40, 92 I.D. 578, 586-88 (1985); Alfred E. Koenig, A-30139 (Nov. 25, 1964). Thus, appellants have presented no relevant issue which is properly subject to the Board's jurisdiction. Having no authority to grant the relief sought by appellants, we are obliged to dismiss the appeal. 1/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge

1/ Our action herein should, in no way, be construed as an endorsement of the disputed corners monumented in the 1983 resurvey and accepted as correct in the subsequent resurvey. Indeed, with respect to corner No. 2, substantial questions remain as to whether it was correctly located. The field notes of the 1983 resurvey expressly noted that "[d]ue to local conditions, the utilization of [Seabron T.] King's resurvey was deemed the best method of protecting the patented entries," yet there seems to be no question that corner No. 2 of the 1983 resurvey is approximately 17 feet west of the location of corner No. 2 in the King resurvey. We are dismissing the instant appeal solely because, as indicated in the text, we are without authority to alter the 1983 resurvey even though there is substantial evidence that it was in error.

